Journal of Criminal Law and Criminology

Volume 51
Issue 2 *July-August*

Article 4

Summer 1960

A Common Sense View of the Fifth Amendment

Louis C. Wyman

A COMMON SENSE VIEW OF THE FIFTH AMENDMENT

LOUIS C. WYMAN

Mr. Wyman has been Attorney General of New Hampshire since 1953. In addition to practicing law in Massachusetts, Florida and New Hampshire, he has served as counsel to two Congressional committees. Attorney General Wyman is a past President of the National Association of Attorneys General of the United States.—EDITOR.

Almost every state in the United States has a constitutional privilege against self-incrimination.[1] This privilege is commonly known by the general public as "The Fifth Amendment" in recognition of the Fifth Amendment to the United States Constitution which affords the privilege to participants in federal proceedings. The United States constitutional privilege does not extend to state proceedings, but the privilege is available under the constitutions of most states.[2] For the sake of simplicity, the privilege against self-incrimination will be referred to herein as "The Fifth Amendment" without regard to whether its application in a particular case derives from federal or state constitutional provisions.

There is little doubt but that application of the Fifth Amendment today has deteriorated to a point where judicial decision limiting its abuse is sorely needed. One need do no more than read the daily newspaper to realize that witnesses before investigating committees of Congress and the states, before grand juries, and in judicial and administrative proceedings generally are often utilizing the Fifth Amendment not to prevent incriminating themselves, but to protect others, or as a thinly veiled way of expressing their contempt for or opposition to the questioner. It is unfortunate that authorities of no less stature than Erwin N. Griswold, Dean of the Harvard Law School, have to some extent encouraged an unnecessarily broadened interpretation of the Fifth Amendment which impedes rather than aids sensible application of constitutional principles in this area.[3]

It is settled law—if indeed it can be said that with the current vogue of divided and concurring opinions and an atmosphere of rapidly changing judicial concepts the law itself is settled—that the privilege against self-incrimination is personal to the witness and cannot be used to protect against the unpleasantness of informing on others.[4] Similarly, a person who claims the Fifth in refusing to answer has no right to do so privately or to prevent the questioner from making the fact public knowledge.[5] That there may follow from such a course of action certain consequences adverse to the financial, spiritual, physical or moral interests of the claimant may be unfortunate, yet this cannot and should not alter the seriousness and real significance of the claim by any witness.[6]

Under present judicial decisions, claiming the Fifth Amendment probably does not require a conclusion that the witness has been guilty of a crime. However, it is submitted that the very least it can mean, if the Fifth Amendment is to continue to be an effective constitutional arm of the Bill of Rights,

[1] 8 WIGMORE, EVIDENCE §2252 (3d ed. 1940.)

[2] See Wyman v. DeGregory, 101 N.H. 171, *cert. denied*, 360 U.S. 717 (1959); In re Pillo, 11 N.J. 8, 93 A.2d 176 (1952); Twining v. New Jersey, 211 U.S. 78 (1908); Jack v. Kansas, 199 U.S. 372 (1905); Brown v. Walker, 161 U.S. 591 (1895).

[3] See GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

[4] Rogers v. United States, 340 U.S. 367 (1951); Hale v. Henkel, 201 U.S. 43, 69 (1906); MCCORMICK, EVIDENCE 269 (1954); 58 AM. JUR., *Witnesses*, 49.

[5] Brown v. Walker, 161 U.S. 591 (1895); Kiewel v. United States, 204 F.2d 1 (8th Cir. 1953); Nelson v. Wyman, 99 N. H. 33, 105 A.2d 756 (1954); United States v. Nesmith, 121 F. Supp. 758 (D.D.C. 1954).

[6] Brown v. Walker, 161 U.S. 591 (1895). See also 8 WIGMORE, EVIDENCE §2255 (3d ed. 1940):

"To invoke the sentiments of lofty indignation and of courageous self-respect against the arbitrary methods of royal tyrants and religious bigots, holding an inquisition to enfore cruel decrees of the prerogative, and torturing their victims with rack and stake, is fitting and laudable and moves men with a just sympathy. But to apply the same terms to the orderly everyday processes of the witness-stand, in a community governing itself in freedom by the will of the majority and having on its statute-book no law which was not put there by itself and cannot be repealed tomorrow—a community, moreover, cursed above others by constant evasion of the law and by overlaxity of criminal procedure,—this is to maltreat language to enervate virile ideas, to abuse true sentiment, to degrade the Constitution, and to make hopeless the correct adjustment of the best motives of human nature to the facts of life. Were it not so serious in its implications, it would be as ludicrous a spectacle as if one were to devote a colossal fortune to founding a hospital for the care of ablebodied vagrants, or to recite Milton's Ode to the Nativity at the birth of a favorite feline's litter."

is that if the witness answered he might furnish a link in a chain of evidence that might lead to his prosecution for a crime not outlawed by the statute of limitations. The word "conviction" has not been used at this point. It is conceivable that facts might be elicited through questioning that, in the mind of the witness, might give him genuine apprehension that those responsible for prosecution in the jurisdiction involved might think he had committed a crime. If this were so, then should the witness be compelled to answer out of his own mouth, he would perforce expose himself to the risk and even the probability of prosecution—the very situation which the Fifth Amendment was designed to prevent.[7]

However, the fact that people may well look askance at a witness invoking the Fifth Amendment should not change the responsibility of the judiciary to stop the abuse of the Fifth by numbers of witnesses and, in the process, to halt the deterioration of public respect for the law which such abuses have demonstrably created.[8] For example, when Dave Beck, the West Coast labor leader, refused on the grounds of the Fifth Amendment even to acknowledge the presence or identity of his own son, it was the natural reaction of most Americans that if this is the law, the law must be "a ass, a fool."

There is no need for this state of the law. Under existing decisions of the Supreme Court such a refusal may understandably be construed as resting upon fear of the application of the doctrine of waiver, although the Supreme Court has said in *Rogers v. United States:*

> "As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination."[9]

While the responsibility of the trial court is clear, it is submitted that too few trial judges have been willing to utilize this discretionary authority to enforce a reasonable restraint upon exercise of the privilege. A "real danger" is not a mere possibility of danger.

Rogers v. United States arose out of a federal grand jury investigation in Colorado. Books and records of the Communist Party of Denver were the subject of inquiry. Jane Rogers, subpoenaed *duces tecum* as treasurer of the Communist Party of Denver, testified that, by virtue of her office, she had been in possession of membership lists and dues records of the Party. Under examination, Mrs. Rogers denied having possession of the records, saying she had turned them over to someone else, but she refused to identify the person to whom she had given the books, stating in court as her only reason, "I don't feel that I should subject a person or persons to the same thing I'm going through." She was thereupon found in contempt, committed to the custody of the marshal, and spent the night in jail. The next day she appeared with her counsel before the Grand Jury and claimed the Fifth Amendment in refusing to disclose the person to whom she had given the books and records. The District Court's ruling that her refusal was not privileged and her sentence of four months in jail was affirmed by the United States Supreme Court on the theory that the Fifth Amendment claim was an afterthought, coming only after she had voluntarily testified relative to her status as an officer of the Communist Party of Denver. In short, she had waived any right to claim the Fifth on that subject. In so holding, the Supreme Court said, *inter alia*, that:

> "To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping-place in the testimony."[10]

And later in the opinion:

> "Disclosure of a fact waives the privilege as to details."[11]

This decision has expectably resulted in situation after situation where attorneys have advised witnesses before investigating committees that the only safe course is to claim the Fifth Amendment very early in the questioning. This results in scandalously remote refusals, such as failure to acknowledge whether or not it is snowing outside, a declination which occurred in the course of an investigation in New Hampshire. It was considered virtually hopeless to transfer this refusal to the courts because of the noticeable reluctance on the part of the judiciary in the last few years to look behind the claim of the Fifth Amendment and to reject it when clearly unreasonably invoked. In a court's discretion this might be done *in camera* in

[7] Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159 (1950).

[8] *Cf.*, O'Conor, *The Fifth Amendment: Should a Good Friend Be Abused?*, 41 A.B.A.J. 307 (1955).

[9] 340 U.S. 367, 374 (1951). See also 8 WIGMORE, EVIDENCE §2275 (3d ed. 1940).

[10] 340 U.S. at 372.

[11] *Id.* at 373.

jury cases or off-the-record in issues to court, but it should be done.

Curiously, there has developed a trend of editorial, law review, and academic comment in the direction of an excessive tenderheartedness toward the motley coterie of Fifth Amendmenteers. One disturbing aspect of this trend is that this nation grew to its present position of material wealth and military power from strength of character and firmness of principle by processes foreign to such an attitude toward pleas of self-incrimination. Our forefathers wisely inserted the Fifth Amendment in our Constitution in an attempt to prevent inquisitions of the types so common in Europe at that time and to protect accused citizens against being compelled to incriminate themselves under torture. It was never intended to license perjury, to exculpate contempt, or to defeat the orderly processes of constitutional judicial procedure, as occurs when a witness claims the Fifth Amendment to protect others and not himself, or when he has committed no crime and knows it and, as anyone can see from the question itself, he reasonably risks no prosecution for crime from his answer.

Some have suggested that the Fifth Amendment should now be construed solely in terms of subjective possibilities implicit in the subject-matter (i.e., leaving it up to the witness to make a final determination) of the question,[12] but if this view is carried to the point of judicial confirmation, for all practical purposes a witness might take the Fifth Amendment with impunity almost in answer to any possible question because his subjective decision would leave no objective basis for rejection.

No one wants to destroy for others or for himself the protection against compulsory self-incrimination that is the plain meaning of the Fifth Amendment. At the same time, as a lawyer, member of a State Judicial Council, and for three-quarters of a decade Attorney General of a State, I have become increasingly aware of growing public disrespect (particularly among adolescents) for law and order, and mounting public cynicism toward the courts' handling of the Fifth Amendment.[13] It takes nothing from you or me to require by judicial interpretation that the claim of the Fifth Amendment shall mean nothing more and nothing less than that there are reasonable grounds to believe that a truthful answer if given might lead to conviction or prosecution for the commission of a crime within the jurisdiction of the questioning authority not outlawed by the statute of limitations. If it be urged that one consequence of such a judicial interpretation is obloquy of a witness who claims the Fifth Amendment, candid observation requires recognition of the fact that refusal to answer because to answer might incriminate must involve a certain measure of moral obloquy *per se*. At the very least, it means that the witness may be unduly sensitive to fears of a risk of prosecution even though not guilty of any crime. It cannot mean less than this for the claim of the privilege can also mean that he *has* committed a crime for which he might be convicted (and which is not outlawed by the statute of limitations).

Maudlin sentimentality implicit in the view that "horrors" are heaped upon individual witnesses by being required to take the Fifth Amendment publicly, because the public generally takes a dim view of the claim, particularly when the witness is a member of the academic fraternity or in public service, should not becloud the issue. Historically, the shoe was on the other foot when the subject-matter of investigation was economic cartels, big business, lobbying, or other fields.[14] Not so, however, when investigations have been probing to determine the existence of subversion within and without the academic community. It seems as though every time the state would inquire into whether (or not) anyone within the academic community has conspired, advocated or taught the overthrow or destruction of state or nation by force, violence or unlawful means, a type of academic paranoia manifests itself, routinely supported by such organizations as the Fund for the Republic, the American Civil Liberties Union, and others. Apparently issues of loyalty and security continue to be violently controversial at

[12] See Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 490 (1957) ("In order to enfore the policies of the privilege a witness must be free to invoke it whenever the question is improper, regardless of what his actual answer would be.... If a question is innocent on its face and is not designed to elicit incriminating information, the witness may invoke the privilege provided he can show that one of the possible answers which is not too remote or fanciful, would be incriminating. In making this showing he may refer to extrinsic matters such as his own reputation and the reputations of persons referred to in the question.")

[13] See, e.g., the comic strip "Dick Tracy," circa December, 1959.

[14] See Black, *Inside a Senate Investigation*, Harper's Magazine, February, 1936.

home or in the halls of Congress when involving an element of compulsion.[15]

Motivation for the clamor of protestation, most prolific amongst the academic community, chronically includes such editorial columns as the *St. Louis Dispatch*, the *New York Times*, the *Washington Post*, and the *Denver Post*, and is usually along one of the following lines:

(a) The cry of academic freedom that the campuses of America are cloistered incubators in which governmental inquiry must not tread lest it discourage the fruits of dissent that ripen on the tree of intellect.[16]

(b) Those who urge that freedom of speech and thought generally is a mainstay of the strength of America; that no one in his right mind in a free society would choose Communism or be subversive; and that the remedy (keeping abreast of potential subversion) is worse than the malady (subversion) itself.

(c) Those who assert that America is the last refuge of proud individualism against state authority and that compulsory disclosures invade individual rights of privacy without reasonable justification, namely, without a showing that state or national security is sufficiently endangered.

(d) Those to whom the First Amendment (much less the Fifth) is akin to Valhalla and who urge that freedom of speech, of press, and of religion, entirely prohibits such inquiry for all practical purposes (including the oft-expressed views of no less than Justices Black and Douglas on the Supreme Court itself[17]).

(e) Those who contend that the personal infamy and attendant harmful consequences to claiming the Fifth Amendment publicly (such as loss of job, harm to reputation or community standing, etc.) should justify extension of the Fifth Amendment so that anyone faced with such a loss may properly plead the Fifth in refusing to answer.

During the days of reaction against certain excesses on the part of occasional individual investigating committee chairmen or members, critics vociferously voiced other objections, such as guilt by association, hysteria, character assassination, and the like. Not as much is heard of these clichés nowadays, largely because some of the sources have apparently felt that they had severely restricted investigatory powers in the field of subversion. Recently, since the High Court reaffirmed state authority to investigate subversion in the *Uphaus* case,[18] the prime editorial line has been to urge that a consequence is to revive the era of the "Fifth Amendment Communist" and other understandable if lamentable descriptive epithets of frustrated investigators. Unfortunately, the intolerance of the liberal left and its blindness to fact when commenting upon objects of antipathy provably exceeds in unfairness and abuse of due process the worst excesses of those who upon occasion stirred up the situation in the first place. This editorial theme gains momentum from the desire of most persons to be free from governmental observation in their private lives and natural reluctance to inform upon others or to expose others to such superintendence, a human weakness not indigenous to America alone.

While the Fifth Amendment itself expressly refers to criminal cases, its application to non-criminal proceedings such as Congressional and state fact-finding investigations is compelled from its nature. There would be little to commend such a restrictive interpretation as would hold that witnesses testifying under oath in extra-judicial proceedings might be compelled to testify without restriction upon the use of their testimony in a subsequent criminal prosecution. However, it is submitted that a re-examination of the present status of the Amendment is imperative. It has been construed and interpreted out of context with its plain and historically intended meaning, with a consequent dilution of both its effect and the respect of citizens for the law.

Members of the bar, whether lawyers or judges, need to face squarely up to the fact that the Fifth

[15] See the Annual Reports of the American Civi Liberties Union, 1952 to 1959. See also Porter, *The Supreme Court and Individual Liberties*, 48 KY. L. J. 48 (1959).

There may well develop a difference in terms of judicial application of the Fifth Amendment to compulsory testimony, between the "ordinary crimes" such as larceny, embezzlement, robbery, murder and the like, and crimes such as treason, sabotage, espionage and subversion which are recognized as involving a design to destroy both the Constitution and the courts themselves. It is not unreasonable to suggest a more stringent restriction upon availability and application of the Fifth Amendment when testimony relates to crimes of the latter category.

[16] See Sweezy v. New Hampshire, 354 U.S. 234 (1957); 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 730 (2d ed. 1958).

[17] See DOUGLAS, THE RIGHT OF THE PEOPLE (1958); Black, J., dissenting, in American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950), and Dennis v. United States, 341 U.S. 494, 579 (1951); Solter, *Freedom of Association*, 27 GEO. WASH. L. REV. 653 (1959).

[18] Uphaus v. Wyman, 360 U.S. 72 (1959), 100 N.H. 436, 130 A.2d 278, 101 N.H. 139, 136 A.2d 221 (1957).

Amendment is being repeatedly and intentionally used by witnesses to cover up a multitude of improper objections from contempt to perjury.[19] This is not good for the cause of American jurisprudence, since public confidence in the law and in our courts is shaken by such antics. The witness who seeks not to protect himself personally but to use the Fifth Amendment as a means for protecting others, does so contrary to the settled principle that it is a privilege personal to the witness alone.[20] Likewise, the claim of the Fifth Amendment as a device to protect against conscientious recriminations or to decline to reveal sources of information, to avoid publicity, or as a matter of personal principle, is an abuse. The problem is a serious one because it affects the moral fiber of basic American principles; moreover, continued loose construction of the Amendment gives aid and comfort to those individuals who with malice aforethought abuse the privilege, seeking to frustrate, defeat and stultify the vital fact-finding function of Congress or state legislatures.[21]

A grant of immunity from prosecution will effectively eliminate applicability of the Fifth Amendment, whether or not the testimony to be elicited might expose the witness to prosecution in another, separate jurisdiction.[22]

But this is an expensive proposition, for the witness is granted full and complete immunity in respect to anything he may have done concerning which he responsively testifies. For this reason, in most situations relating to possible subversive activities, the grant would and should be made only to a witness who is believed to possess considerable information concerning the activity of others.[23]

It becomes increasingly obvious in attempting to achieve a commonsense application of the Fifth Amendment as applied to disclosures elicited by questioning in investigations, that certain fundamentals need to be remembered. Among these are the fact (1) that an investigation is an investigation and is not a prosecution[24]; (2) mere fact-finding questioning concerning what happened or what was in fact said or done is neither prior censorship nor an injunction to conformity, nor a charge nor an indictment[25]; (3) empirical denials of ultimate facts under investigation by witnesses cannot be permitted to preclude relevant cross-examination to test the truth of the denials nor shift to the investigating agency the burden of establishing probable cause for further questioning to the satisfaction of the witness.[26]

Constitutional amendment limiting the scope of the Fifth Amendment is unnecessary. The limitation should come from judicial interpretation. As Mr. Justice Frankfurter has so aptly indicated, the ultimate final answer to any judicial problem in the United States is the word of the Supreme Court of the United States.[27]

What appears to be needed specifically is:

A. A Court decision radically limiting the doctrine of waiver. This can be achieved by a reversal or strict limitation upon *Rogers v. United States*,[28] and thus neither a witness nor his counsel would fear going to the threshold of an incriminating question before claiming the Fifth Amend-

[19] See TAYLOR, GRAND INQUEST 201 (1955); Williams, *Problems of the Fifth Amendment*, 24 FORDHAM L. REV. 19 (1955); 8 WIGMORE, EVIDENCE, §2279 (3d ed. 1940).

[20] Rogers v. United States, 340 U.S. 367 (1951); United States v. Murdock, 284 U.S. 141 (1931).

[21] See Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311 (1955); 8 WIGMORE, EVIDENCE §2272*a* (3d Ed. 1940).

[22] DeGregory v. Wyman, 100 N.H. 163, 513, 101 N. H. 82, 171, *cert. denied*, 360 U.S. 717 (1959).

[23] *Cf.*, N.H. REV. STATS. ANNOT., c. 588 (1959); DeGregory v. Wyman, *supra* note 22.

[24] Uphaus v. Wyman, 360 U.S. 72 (1959).

[25] See briefs in Wyman v. Sweezy, 100 N.H. 103 (1956).

[26] See Ex Parte Senior, 37 Fla. 1, 19 So. 652, 656 (1896); Wyman v. Sweezy, 100 N.H. 103, 108 (1956) (" 'It is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation.' *Dennis* v. *United States*, 341 U.S. 494, 572. The distinction is one of fact. The defendant's denial that he advocated, taught or in any way furthered the aim of overthrowing constitutional government by force or violence in his lecture is simply his determination of that fact, which the committee could believe or not as it saw fit. The witness could not by his answer impose upon the investigating committee the burden of producing evidence that a doctrine aimed at the violent overthrow of existing government was in fact advocated by him before it could inquire of him concerning the lecture.")

Curiously, this undeniable fundamental appears to have been ignored in the concurring opinion of Justices Frankfurter and Harlan in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), where the empirical denials of the witness Sweezy seem to have been accepted at face value and considered as having foreclosed further investigation in the nature of cross-examination. This point, though not involving the Fifth Amendment directly, is capable of similar application and should be cleared up.

[27] "Such a judgment must be arrived at in a spirit of humility when it counters the judgment of the State's highest court. But, in the end, judgment cannot be escaped—the judgment of this Court." Frankfurter, J., concurring, in Sweezy v. New Hampshire, 354 U.S. 234, 266 (1957).

[28] 340 U.S. 362 (1951).

ment.[29] It is the doctrine of waiver that in large measure has led to so much public ridicule and contempt, for when, as the Lord Chancellor of Great Britain has written in comment upon the Alger Hiss case, a witness takes the Fifth Amendment on the question of whether he plays tennis or is a member of the American Legion, for fear of waiver, it is carrying things too far.[30] In this connection, it should make no difference whether the witness has denied or affirmed essential criminal facts in his previous answers. He should be permitted to take the Fifth in not replying to any question without fear that his previous answers shall constitute a waiver of his right to later claim the Fifth Amendment, *provided always* that the requirements of the next sub-paragraph (B) exist in the claim of the Fifth.

B. Judicial decision should affirm that a plea of the Fifth Amendment means that the witness, acting honestly, has reasonable grounds to believe that if he answered truthfully such an answer might furnish a link in a chain of evidence that *might* lead to his conviction or prosecution for a crime not outlawed by the statute of limitations. The decision should affirm explicitly that the link is not in the realm of speculative possibility but rather of discernible and reasonable probability, reasonably obvious to the trial court or questioner on the face of the record. The decision should reaffirm that a claim of the Fifth Amendment for reasons beyond the foregoing, whether tested by the question or tested by the possible answer, is improper and—as Chief Justice Marshall once said—"in conscience and in law as much a perjury as if he had declared any other untruth upon his oath."[31] (This requirement assumes that the resolution empowering the investigating agency has been found to be constitutional and the question itself relevant thereto.)

C. State legislation empowering the granting of immunity to the witness when it seems necessary and advisable to do so.

D. Specific judicial disapprobation and limitation upon use of the Fifth Amendment for subjective reasons of conscience, dislike of the questioner or the question, or disinclination to inform on others.

E. Legislation establishing for federal and state agencies the judicial transfer that applies in New Hampshire, *i.e.*, that whenever a witness declines to answer or refuses to obey a subpoena or to produce documents, the administrative agent or committee may then transfer the matter by petition to any Justice of the Superior Court, who shall then continue with the matter in court as though the original proceedings had been commenced in court. In this way, long and protracted delays in judicial determination of constitutionality, relevancy, and appropriateness of the claim of the Fifth Amendment, may be promptly secured and the witness assured of constitutional protections in the process.[32]

A liberal injection of judicial common sense into the never-never land that has repeatedly characterized invocation of the Fifth Amendment in recent years is genuinely needed, particularly in the field of legislative and congressional investigations. Such a doctrine would be a step forward for American jurisprudence, and would do much to restore public confidence in the law. Carefully phrased and properly handled in the trial court, it will neither limit nor destroy any of our essential or traditional freedoms.

[29] This would constitute a substantial adoption of the English law. See Annot., *Self-Incrimination, Waiver*, 95 L. Ed. 2d 354, 360 (1951); Annot., *Self-Incrimination—Waiver as to Details*, 147 A.L.R. 255, 263 (1943).

[30] Jowitt, The Strange Case of Alger Hiss 142 (1953).

[31] United States v. Burr, 25 Fed. Cas. 38 (1807).

[32] N.H. Rev. Stats. Annot., c. 491, §§19 and 20:
"19. *Petition.* Whenever any official or board is given the power to summon witnesses and take testimony, but has not the power to punish for contempt, and any witness refuses to obey such summons, either as to his appearance or as to the production of things specified in the summons, or refuses to testify or to answer any question, a petition for an order to compel him to testify or his compliance with the summons may be filed in the superior court, or with some justice thereof.
"20. *Procedure.* Upon such petition the court or justice shall have authority to proceed in the matter as though the original proceeding had been in the court, and may make orders and impose penalties accordingly."